

E-Filed 12/28/05

NOT FOR CITATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

MICROSOFT CORPORATION,

Plaintiff,

V.

SUNCREST ENTERPRISE, et al.,

Defendants.

Case Number C 03-5424 JF (HRL)

**ORDER DENYING PLAINTIFF'S
MOTION TO ENFORCE
SETTLEMENT**

[Doc. No. 47]

Plaintiff Microsoft Corporation (“Microsoft”) moves to enforce a settlement purportedly entered into with Defendants Suncrest Enterprise, Inc. (“Suncrest”) and its principal, Defendant Yi-Ling Chen (“Chen”). The Court has considered the briefing of the parties as well as the oral arguments presented at the hearing on December 16, 2005. For the reasons discussed below, the motion will be denied.

I. BACKGROUND

Microsoft filed the instant copyright infringement action on December 2, 2003, alleging that Suncrest, a computer goods wholesaler, was selling counterfeit Microsoft software. There was little activity in the case during the following year. Defendants retained new counsel on September 10, 2004, and shortly thereafter Suncrest filed a third party complaint against the company that had supplied the suspect goods, M-Plus International Technology, Inc. ("M-Plus"),

1 and two M-Plus principals.

2 The parties participated in a mediation with Margaret Corrigan at the Mediation Offices
 3 of the Ninth Circuit Court of Appeals in San Francisco on May 12, 2005. The case did not settle
 4 at that time, and on the following day Defendants' counsel withdrew as counsel of record.
 5 Defendant Chen, proceeding *pro se*, subsequently participated in telephonic settlement
 6 discussions with Microsoft's counsel. Chen is an immigrant from Taiwan, speaks Chinese as her
 7 primary language, and speaks only limited English. Chen Decl. ¶ 3. Chen is not an attorney, but,
 8 according to Microsoft, she entered into a binding oral settlement agreement on behalf of herself
 9 and Suncrest during the telephonic discussions with Microsoft's counsel. Microsoft claims that
 10 the key terms of the oral settlement were as follows: Defendants would pay Microsoft \$90,000
 11 on or before July 15, 2005; the parties would stipulate to a permanent injunction against
 12 Defendants; and Microsoft would dismiss the action against Defendants with prejudice. Chen
 13 disputes Microsoft's characterization of the telephonic discussions, and asserts that no binding
 14 settlement was reached.

15 Microsoft claims that after the oral settlement had been reached, Ms. Corrigan arranged
 16 for a conference call on June 28, 2005 with herself, Microsoft's counsel and Chen, and that
 17 during that call Microsoft's counsel and Chen orally confirmed the terms of the settlement
 18 agreement. Chen disputes Microsoft's characterization of that conference call, and asserts that
 19 she never agreed to a binding settlement.

20 On July 6, 2005, the following entry was made on the Court's docket:

21 ADR Remark: case fully settled after further phone discussions following
 22 5/12/2005 mediation session. ADR process completed. (af, COURT STAFF)
 (Filed on 7/6/2005) (Entered: 07/06/2005)

23 It is not clear who made this entry. What is clear is that the entry is erroneous at least in part,
 24 because even assuming that there was a settlement between Microsoft, Chen and Suncrest, there
 25 was no settlement with M-Plus or the M-Plus principals. Thus, the case was not "fully settled."

26 Also on July 6, 2005, Microsoft filed a notice of settlement as between itself and Chen
 27 and Suncrest. Microsoft sent Chen a draft written agreement reflecting the terms as Microsoft
 28 understood them in early July, asking Chen to sign "if acceptable." Chen did not sign the draft

1 agreement, but rather retained John Gorman and Craig Hansen of Gorman & Miller to represent
 2 her and Suncrest; new counsel substituted in as counsel for Defendants on July 14, 2005.
 3 Microsoft's counsel, Jennifer Chiarelli of Perkins Coie, thereafter telephoned Mr. Gorman to
 4 inquire about the status of the settlement. Mr. Gorman stated that he needed to review the file
 5 and determine whether Defendants would be proceeding with the settlement. That conversation
 6 is memorialized in a July 26, 2005 letter from Ms. Chiarelli to Mr. Gorman.

7 Mr. Gorman states in his declaration that subsequently he notified Ms. Chiarelli that
 8 Defendants would not settle. Gorman Decl. ¶ 10. Mr. Gorman asserts that Ms. Chiarelli did not
 9 take the position that a binding settlement had been reached. *Id.* The parties then began taking
 10 discovery. On August 17, 2005, the parties entered into a stipulation to continue trial and pretrial
 11 dates, providing in part that:

12 The parties participated in a mediation on May 12, 2005 and after several follow
 13 up discussions, plaintiff Microsoft Corporation ("Microsoft") and defendants
 14 Suncrest Enterprise and Yi-Ling Chen a/k/a Eileen Chen (collectively,
 15 "Defendants") had contemplated that they would be able to reach a settlement of
 16 their portion of the case. Microsoft accordingly filed a Notice of Settlement with
 17 the Court on July 6, 2005. However, Microsoft and Defendants were unsuccessful
 18 in finalizing the settlement. Consequently, the parties request a continuance to
 19 allow them to complete discovery, which had been deferred in light of the
 20 aforementioned settlement.

21 The Court issued an order adopting the stipulation on August 25, 2005. The parties thereafter
 22 exchanged hundreds of discovery documents and took depositions. Microsoft did not file the
 23 instant motion to enforce the settlement until November 7, 2005.

24 II. DISCUSSION

25 "It is well settled that a district court has the equitable power to enforce summarily an
 26 agreement to settle a case pending before it." *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987).
 27 However, the existence of conflicting evidence as to whether the parties had a meeting of the
 28 minds regarding the material terms of the purported settlement agreement makes summary
 enforcement inappropriate. *Id.* at 891.

29 In the instant case, there is conflicting evidence as to whether the parties actually agreed
 30 to settle the case on the terms outlined by Microsoft. The Court cannot consider evidence of
 31 statements made during the mediation proceedings. *See* Fed. R. Civ. P. 408; Civ. L. R. 6-11. In

1 the Court's view, this mediation privilege extends to the substance of the mediator-sponsored
 2 conference call during which the mediator allegedly obtained oral confirmation of the settlement
 3 agreement from Microsoft's counsel and Chen. The mediation privilege clearly does not extend
 4 to the telephonic settlement negotiations conducted by the parties without the aid of the mediator,
 5 or to the draft settlement agreement sent to Chen by Microsoft's counsel; however, the parties
 6 have presented conflicting declarations as to what was said during those negotiations and as to
 7 the import of the draft settlement agreement.¹

8 Microsoft points to the July 6, 2005 docket entries reflecting settlement of the case.
 9 While these entries reflect the subject belief of Microsoft, and arguably of the mediator, neither
 10 entry was made on behalf of Defendants or with Defendants' consent. In fact, it appears that
 11 Defendants did not receive notice of the docket entries because prior counsel had withdrawn and
 12 Mr. Gorman had not yet appeared. Accordingly, the docket entries provide no aid in determining
 13 whether Chen intended to, or believed that she had, entered into a binding oral settlement
 14 agreement.

15 Moreover, the letter accompanying the draft settlement agreement sent to Chen indicated
 16 that Chen should sign the proposed agreement "if acceptable." Chen declined to sign the
 17 proposed agreement and instead retained Mr. Gorman. Mr. Gorman states in his declaration that
 18 he subsequently informed Microsoft's counsel that Chen would not agree to the proposed

19 ¹ Microsoft moves to strike portions of Chen's declaration on the ground that it
 20 impermissibly discloses the substance of confidential mediation proceedings. Microsoft also
 21 argues that Chen refused to answer deposition questions regarding the mediation proceedings.
 22 Chen argues that *Microsoft* is the party that first disclosed the substance of the mediation
 23 proceedings, and that Chen responded only to correct the record. As noted above, the Court
 24 cannot consider *any* evidence regarding the substance of mediation proceedings. Accordingly,
 25 Microsoft's motion to strike will be granted insofar as Chen's declaration violates the mediation
 privilege. However, the Court will consider Chen's declaration with respect to her statements
 regarding her background, the chronology of this case, and her opinion that she did not enter into
 an oral settlement with Microsoft.

26 Microsoft also moves to strike portions of Mr. Gorman's declaration on the ground that
 27 certain statements are made without personal knowledge or constitute argument. That motion
 28 will be granted. However, the Court will consider Mr. Gorman's statements regarding the
 chronology of this case and his description of communications he had with Microsoft's counsel.

settlement terms, and that Microsoft’s counsel did *not* at that time assert the position that Chen had entered into a binding oral settlement. Gorman Decl. ¶¶ 10. The parties subsequently entered into a stipulation stating that while the parties had hoped to settle, “Microsoft and Defendants were unsuccessful in finalizing the settlement,” and requesting an extension of the case management schedule so that the parties could pursue discovery. The parties thereafter engaged in document production and depositions. So far as the Court can determine from this record, Microsoft did not take the position that the parties settled in June until five months later when Microsoft filed the instant motion on November 7, 2005.

Based upon this record, the Court concludes that summary enforcement of the alleged settlement agreement is inappropriate. *See Callie*, 829 F.2d at 891. The Court could hold an evidentiary hearing in order to determine whether the parties entered into a binding settlement agreement. *See id.* at 890. However, based upon the record presently before it, the Court concludes that such a hearing would not resolve the factual disputes created by the conflicting evidence discussed above. Accordingly, the Court will deny Microsoft's motion.

The Court's ruling is without prejudice to Microsoft's right to assert the existence of the purported oral settlement agreement through other means, for example, by pleading a claim for breach of oral contract or a defense based upon oral settlement.

III. ORDER

- (1) Plaintiff's motions to strike portions of the Chen declaration and the Gorman declaration are GRANTED as set forth herein; and
- (2) Plaintiff's motion to enforce the alleged settlement agreement is DENIED.

DATED: December 28, 2005

/s/ electronic signature authorized

JEREMY FOGEL
United States District Judge

1 This Order was served on the following persons:

2

3 John C. Gorman jgorman@gormanmiller.com

4 Craig Alan Hansen chansen@gormanmiller.com

5 Andrew K. Jacobson andy@bayoaklaw.com

6 Shawn T. Leuthold leuthold@aol.com

7 Katherine Dugdale
Perkins Coie LLP
8 1620-26th Street, Sixth Floor
South Tower
9 Santa Monica, CA 90404-4013

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28